

CHAPTER 1

ETHICS

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OVERVIEW AND ETHICAL CONSIDERATIONS

OVERVIEW

Definitions

The phrases "make a record", "made a record" and "making a record" refer to the process of using one or more of the means specified by Ind. Trial Rule 74 and Ind. Crim. R. 5 in order to preserve: (1) statements and objections, and arguments of counsel; (2) verbal expressions and verbal testimony of the judge, the witnesses, the parties, the jurors, and any members of the public that may occur during any proceeding, hearing, bench trial, or jury trial.

The word "record" refers to the result obtained after the process of "making a record" has been completed. The meaning of the word will vary depending upon the means of preservation used by the court reporter. The method could be handwritten longhand notes, handwritten shorthand notes, stenographic paper notes, stenographic computer disks, an audio electronic recording tape or digital recording to computer hard drive or compact disk.

The phrases "audio electronic tape recording(s)", "audio recordings", "electronic tape" and "electronic tape recording(s)" refer to "electronic . . . device" language of T.R. 74 and the "electronic recording" and "recording device" language of Crim. R. 5.

A "transcript" refers to a typed document intended to constitute the transcription of the record of a particular proceeding, bench trial or jury trial conducted in either a civil or criminal case.

A transcript is in the form specified by App. R. 27 - 29. A transcript is filed with the clerk of the court as required by T.R. 74, Crim. R. 5, and App. R. 11. The language of the Notice of Appeal determines the content of a transcript.

The phrase "Record on Appeal" refers to the definition found in App. R. 2.

History Of Reporting And Development Of Reporting Systems

Early History

Reporting has been traced back more than 2,000 years. From notes found on the margins of Ancient Greek and Egyptian manuscripts, we know that it was practiced as early as the Fourth Century B.C. Marcus Tullius Tiro, a freedman of Ancient Rome, developed a system with which he recorded the speeches of the great orator Cicero. Tironian, as his system became known, was learned by the emperor Augustus, who later taught it to his grandchildren. It was also used by other writers in recording speeches in the Roman Senate.

The story of reporting as it exists today begins with the 16th Century. The first system of reporting approaching fully phonetic writing was devised by Timothy Bright, who in the year

1588 published a treatise on shorthand dedicated to Queen Elizabeth I. Shorthand characters were then used for more than a century by ministers and scholars to write their sermons and letters, and even used in diaries, because some believed it afforded more privacy than longhand. Samuel Pepys' diary, the first entry of which was made in 1660, and the last in 1669, was written in shorthand to attain secrecy.

The year 1750 saw the publication of the system of Thomas Gurney, the first official reporter of parliamentary debates in Great Britain - a post that was held by members of his family down to recent times. About 1786 the system of Taylor became immensely popular. Before he became a famous author, Charles Dickens, practiced as a parliamentary reporter and used the Taylor system. His struggles in acquiring speed, as described in "David Copperfield," continue even today in modern reporting as a paramount labor, together with the acquisition of accuracy.

Shorthand

Modern shorthand began with the introduction of Pitman shorthand in 1837, followed some fifty years later by Gregg shorthand. These are known as manual systems, that is, written with pen or pencil using graphic symbols to represent phonetic speech. The Century system of shorthand also continues in existence, as a manual system, but with characters different from Gregg. In 1913, a method was introduced for the writing of shorthand by machine, known as machine shorthand, stenotype or touch shorthand. In this method a touch of keys in various combinations produces phrases, as a touch of piano keys produces chords.

In addition to manual shorthand and stenotype, there are five other methods for producing a transcript in use today. "Audio recordings" preserve court proceedings by recording participants' voices over microphones onto tapes, either reel-to-reel or cassette. Both single and multi-track machines are used. A "stenomask" reporter uses a single-track audio recording machine and repeats the words spoken in the courtroom into a microphone encased in a soundproof mask much like a simultaneous interpreter or language reporter in court. The Gemelli voice-writing technique is an adaptation of the stenomask. A multi-track recording machine is used to record both the reporter's whispers (there is no mask) and the voices of the participants.

The two remaining methods are the most recent developments in reporting. A "video record" of court proceedings can be made by electronically recording on to videotape the participants' voices and images. It is most often used in taking depositions and not for the production of a written transcript. Videotaped depositions are sometimes taken in evidence at trial upon qualification. "Computer Aided Transcription (CAT)" uses a modified stenotype machine which electronically records the symbols on a magnetic disc. The disc is inserted into a computer, which produces an on-screen draft for editing by the reporter. The computer-printer then prints a transcript from the edited disc material. The CAT system promotes speed in transcript production. It enables, for example, the speedy preparation of "same day transcripts" during the course of litigation for a multitude of purposes. More and more court reporters in the State of Indiana are being trained in, and utilize, the CAT system. Success using either of these

systems requires two (2) skills: speedy and accurate disc production and accurate on-screen editing of disc material.

In the article "Technology and Access to the Courts" appearing in the summer, 1994 issue of Court Review," American Judges Association; Roger Miller, President of the Nation Court Reporters Association states:

"Many important by-products have appeared with CAT: keyword indexing, rapid or instant building, and interfacing the digital record with computer systems."

"But the unique capability of CAT is production of the real time record. Real time is translation in its purest form, defined as the conversion of the spoken word simultaneously into printed format. Never before have we been able to convert the spoken word to the written word almost simultaneously. This represents a magnificent achievement in verbatim reporting."

"In the late 1970s, the first practical system for real time translation appeared in the marketplace. And by 1981, it was sophisticated enough to be used for real time closed-captioning."

The caseload of the majority of courts in Indiana is increasing drastically each year. Just as our court system is changing to keep up with times and demand, so must the professions that serve.

There is an increased burden on court reporters to produce more transcriptions in less time. If an efficient court system is to be maintained, it must remain staffed with skilled personnel and up-to-date equipment. Alexander B. Aikman, Senior Staff Attorney, N.C.S.C., in his article, "Measuring Court Reporter Income and Productivity," supports the importance of skilled court personnel and their burdensome task:

"No other person in the courtroom must concentrate on and follow the proceedings to the same degree."

PREPARATION FOR A CAREER AS A COURT REPORTER

The court reporter must possess three distinct skills: (1) an accurate typing speed in an electronic environment, (2) language interpretation/translation skills and (3) basic familiarity with court processes and procedures. The court reporter is usually hired on the strength of demonstrated abilities in these areas and educational credentials. A person preparing for this demanding career will need both specialized training and a good general education.

Attaining adequate skill in reporting by shorthand or stenotype involves an estimated 24 months of study and practice, an extremely demanding and expensive process. Court reporters

who have mastered the shorthand and stenotype speed necessary for verbatim reporting are in great demand in the free-lance field.

Some judges, who work within limited budgets, may expect the court reporters to perform a variety of other general duties. The judge may rely heavily upon the electronic recording method of court reporting. The judge might utilize a typist, who might not have undergone a strenuous formal educational process.

A high school diploma is a required minimum educational background. An associate college degree coupled with some law related experience is desirable. The person seeking a position should take training relating to basic courtroom procedure, legal terminology and pleadings. An extensive vocabulary, a good understanding of English grammar, punctuation, and technical terminology are desirable

Continuing professional education, whether formalized or self-developed, is an essential ingredient for the continuing betterment of the justice system and the professional and personal attributes of the court reporter.

ETHICS AND PROFESSIONALISM

Court reporters look to Indiana's Code of Judicial Conduct for guidance and decorum and performance, both in and out of the courtroom. That Code, found in the Indiana Court Rules, is binding on judges and contains several sections, which are specifically directed to court reporters and other court personnel. Other canons therein, though not directly applicable to the judge's staff, serve as guidelines for addressing situations where political, personal and business involvements might conflict with professional responsibility. The court reporter must always be cognizant of the overriding requirements of propriety of action, impartiality of treatment, and balance in approach.

The court reporter is a public servant. See IC 35-41-1-24. The court reporter must follow the court rules, case law, and statutes, as they apply to an officer of the court. The court reporter is responsible to the judge for production of records and transcripts, and for related deportment.

Upon the acceptance of an appointment as a court reporter, the court reporter should be aware that there are certain specific rules of conduct unique to this position. The best source of knowledge relating to specific rules of conduct is the judge.

Code of Judicial Conduct

Canon 1(A)

"An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct . . ."

This canon sets the philosophical tone for judicial and staff conduct, and the relationship between judge and staff relative thereto. It promotes the independence and separateness of the judicial branch of government as the essential for propriety of life and action, and requires the continuing goal of high standards of conduct for this entire branch of government, judges and staff alike.

Canon 2(A)

"A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

This canon establishes reasonable control over the after-hours conduct of the judge and the court reporter. This canon should be read in connection with Ind. Judicial Canon 3 (C)(2), at least with respect to the obligations to respect and to comply with the law, the maintenance of confidentiality, and the maintenance of impartiality. Jud. Canon 3(C)(2) utilizes the word "require". The word "require," means that the judge "is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control". See Code of Judicial Conduct "Terminology"

Canon 3(B)(4)

"A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others, subject to the judge's direction and control."

Here, the personal attributes of character and demeanor required of those in the judicial system are defined; the meaning of impartiality is expanded. This canon relates directly to the behavior expected of the court reporter both while making a record in court, and while dealing with attorneys, members of the media, or members of the public outside of court. Patience, dignity and courtesy should be endorsed as high standards of conduct in the judicial system.

This canon should be read in connection with Jud. Canon 3(B)(8)(a) & (c). The judge has an obligation not to engage in ex parte communications regarding pending cases. Exceptions are provided for emergencies, administrative or scheduling purposes. The judge may communicate with the staff, including the court reporter. The line between an administrative purpose or a scheduling purpose and an improper ex parte communication may be narrow. Attorneys may try to engage in ex parte communication under the guise of posing a scheduling or other administrative question. In a recent case, an out-of-state attorney asked a court reporter if it was proper to file an appearance and a motion for an extension of time that was not in proper form. The court reporter told the attorney to file the documents. The out-of-state attorney attempted to utilize the discussion with the court reporter as an excuse to obtain relief from a default judgment. The Court of Appeals admonished the out-of-state attorney. See Pro-Lam,

Inc. v. B & R Enterprises, 651 N.E.2d 1153 (Ind. Ct. App. 1995). The court reporter should consider these canons when engaging in communications with attorneys. The court reporter must refrain from expressing opinions regarding the performance of counsel and must refrain from expressing legal advice.

Canon 3(B)(6)

" A judge shall refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and shall require the same standard of conduct of others subject to the judge's direction and control."

The rationale is founded in constitutional provisions protecting equality, negating discrimination, and substantiating the human endowment. The court reporter must refrain from conduct that could be perceived as sexual harassment. This canon should be read with Jud. Canon 2(A); this canon may establish a standard prohibiting after-hours conduct that might be perceived as sexual harassment.

Canon 3(B)(8)(a) &(c)

"A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties, concerning a pending or impending proceeding, except that:

- (a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
 - (i) The judge reasonably believes that no party will gain a procedural or tactical advantage as a result of an ex parte communication, and
 - (ii) The judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond . . .
- (c) A judge may consult with court personnel and others whose function is to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges.

Several cases discuss these requirements. In the case of Matter of Guardianship of Garrard, 624 N.E.2d 68 (Ind. Ct. App. 1993), judge ex parte discussed a submitted written child custody report with its therapist author; held: a new trial was required. In the case of Mahrtdt v. State, 629 N.E.2d 244 (Ind. Ct. App. 1994), judge placed ex parte telephone call to Sheriff to reschedule examination of breath machine used to measure quantity of alcohol in a person's blood; judge promptly informed State and defendant of information received during the call. Held: call was "administrative" and was "not improper". In the case of Bell v. State, 655 N.E.2d 129 (Ind. Ct. App. 1995), judge placed ex parte telephone call to Sheriff; held: improper contact

occurred because judge did not disclose fact of call or contents of call to defendant and judge did not allege that purpose of call was for administrative or scheduling purposes. In Matter of Johnson, 658 N.E.2d 589 (Ind. 1995), judge and court reporter engaged in ex parte communications regarding rescheduling of a trial with a deputy prosecutor without consulting defense counsel; defense counsel was given 2 days advance notice of trial. Held: a public reprimand was issued. The test is: "whether an objective person, knowledgeable of all the circumstances, would have a reasonable basis for questioning a judge's impartiality". See Bell, *supra* at 655 N.E.2d 132. This Canon should be read with Jud. Canon 3 (B) (4).

Canon 3(B)(10)

"A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel, subject to the judge's direction and control"

The court reporter may not make a public comment about a pending matter, even during the appeal process, if that comment might reasonably be expected to affect outcome or impair fairness. The court reporter must be vigilant when dealing with members of the media. This canon should be read in connection with Jud. Canon 2(A). The court reporter must refrain from after-hours private comments consistent with confidentiality requirements. The court reporter may not always be able to discern the impact that a seemingly innocent remark might have on the perception of a fair trial. Given the overriding requirements of propriety and fairness, silence outside of the courtroom will afford the best protection.

Canon 3(B)(12)

"A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity."

The court reporter must not take advantage of private information gleaned during the course of official duties either for direct personal benefit or for indirect personal benefit by aiding another. This canon should be read with Jud. Canon 2(A) and Jud. Canon 3(C) (2). After-hours disclosure of confidential material is prohibited.

Canon 3(C)(2)

"A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties."

By direct inference, this canon applies the Code of Judicial Conduct to the court reporter. The language clearly establishes the tone of relationship between judge and court reporter. The canon requires the court reporter to maintain an operational balance between interests that may

conflict and compete. The court reporter is required to provide equal and fair service to lawyers, litigants, and members of the public. The court reporter is prohibited from engaging in conduct that might be perceived as providing an unfair advantage to any interest. An ethical duty of diligence is created and imposed upon the court reporter.

Canon 4(B)

"A judge may speak, write, lecture, teach and participate in other extra judicial activities concerning the law, the legal system, the administration of justice, and non-legal subjects, subject to the requirements of this Code."

The court reporter may participate in activities that tend to promote, nurture, encourage, teach, help, and guide other court reporters. This Handbook would not exist without the efforts of many court reporters who, in the spirit of this canon, undertook to share their experiences for the purpose of benefiting other court reporters who may read this Handbook.

Canon 5(A)(1)(f)

"Except as authorized in sections 5B(2), 5C(1), 5C(3) and 5D, a judge or a candidate for election or appointment to a judicial office or retention in judicial office shall not: . . . (f) permit the judge's employees and officials subject to the judge's discretion and control to be candidates for or hold positions as officers of a political party's central committee, or to be candidates for or hold non-judicial partisan elective offices."

This canon is a most succinct reference to political activity by the court reporter. If the incumbent judge is a candidate for public office, the judge's staff may not do, or engage in doing, any activity that the judge is prohibited from doing.

SPECIAL REQUIREMENTS

Private Communications

The court reporter, privy to the judge's verbal legal reasoning off the record as a part of the decision-making process, must keep such information in the strictest confidence.

Media

If the court reporter is assigned to handle the dissemination of information to news media, the court reporter must relate only what the record reveals without interpretation, personal comment, or related comment. The optimum practice is to invite media representatives to inspect the record and make their own discernment. In the event that the record has been ordered sealed by the judge, the court reporter must not reveal the contents of the record. See Chapter 2.

Record Maintenance and Safekeeping

The court reporter has the responsibility for the maintenance and safekeeping of the record and exhibits. Exhibits or tapes should not leave the custody and control of the court reporter and should not be removed from the court facility, except for an emergency or upon authorization of the judge. It is acceptable practice to allow litigants, represented or pro se, counsel, members of the press and members of the public, to listen to the tapes in accordance with procedures designed to guarantee the integrity of the record. The court reporter must exercise diligence at all times to maintain and protect the genuineness of the tapes against either potential tampering or loss.

During the course of a trial, exhibits are treated differently. See Chapter 2, Section: **The Court Reporter and the Right of Public and Press to Access Public Records**, subsection **Public Access to Records**. After the conclusion of the trial or proceeding, members of the public and the press may view the exhibits unless the judge has issued an order that prevents access. During the trial counsel and parties may examine the exhibits. The court reporter is required to be personally present during any exhibit examination. The court reporter must exercise diligence at all times to maintain and protect the genuineness of the exhibits against potential removal, tampering, alteration, damage, or loss.

Necessity of a Notice of Appeal

The court reporter should not undertake the preparation of a transcript unless the court reporter has received a timely and proper notice of appeal, a written order from counsel during trial, or an order from the judge.

Preparation of Transcript

The court reporter who makes the record of a trial or proceeding is generally responsible for the preparation of the transcript of that trial. Reasons of style and interpretation dictate that this practice results in a more complete and accurate record.

Both T. R. 74 and Crim. R. 5 authorize a judge to use "other" persons to prepare a transcript from a trial or. Other persons may be utilized to type a transcript in compliance with orders from the Indiana Supreme Court and to avoid a possible contempt sanction. See **Matter of Hatfield**, 607 N.E.2d 384 (Ind. 1993). In the event that a person (other than the reporter who made the record of the trial or proceeding) types the transcript, the person who types the transcript signs a Reporter's Certificate that the transcript is complete and accurate.

Examination of the **NORMAL CERTIFICATION REPORTER'S CERTIFICATE** form in the Appendix reveals that the word "true" is omitted from the **NORMAL CERTIFICATION REPORTER'S CERTIFICATE** in the event that a person other than the court reporter types the transcript from an audio tape(s). In other words, the assumption behind the **NORMAL CERTIFICATION REPORTER'S CERTIFICATE** is that the court reporter, who attended and witnessed the trial or proceeding and who made the record, also prepared the transcript. This revision contains a form certification for a typist preparing the transcript and a form certification for a typist and court reporter preparing the transcript.

Procedure in the Event of an Ethical Violation

(DISCUSS WITH FULL COMMITTEE)

If an inadvertent ex parte communication is made by the court reporter, it should be remedied by prompt disclosure to all parties, after immediate consultation with the judge. If an ex parte communication is solicited from the court reporter, the court reporter must refuse to respond; the court reporter must immediately notify the judge.